UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES

TARHEEL SPECIALTIES, INC.

and

Case No. 4-CA-35895

INDUSTRIAL, TECHNICAL AND PROFESSIONAL EMPLOYEES UNION, OPEIU LOCAL 4873, AFL-CIO

Donna D. Brown, Esq., for the General Counsel. Sidney H. Kalban, Esq., for the Charging Party.

DECISION

Statement of the Case

GEORGE ALEMÁN, Administrative Law Judge. This case was tried in Philadelphia, PA on May 21, 2009, pursuant to a complaint issued against Tarheel Specialties, Inc. (herein the Respondent) on May 30, 2008 by the Regional Director for Region 4 of the National Labor Relations Board (the Board).¹ The complaint alleges that the Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) by failing and refusing to bargain in good faith with the Union, which is the exclusive collective bargaining representative of all of the Respondent's nonsupervisory employees.² In response to the complaint, the Respondent, through its president, Daniel Gurkin, wrote to the Regional Director for Region 4 on June 12, 2008, asking that "any action against Tarheel be dismissed" because "no addendum was ever signed for the Eastern PA."

All parties at the hearing were afforded a full and fair opportunity to be heard, to present oral and written evidence, to examine and cross-examine witnesses, and to argue orally on the record. The Respondent, it should be noted, was not present or represented at the hearing. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by Counsel for the General Counsel and the Charging Party, I make the following

¹ The unfair labor practice charge underlying the complaint allegations was filed January 14, 2008, and amended March 24, 2008, by Industrial, Technical and Professional Employees Union, OPEIU Local 4873, AFL-CIO (herein the Union or Local 4873). The Union, also known simply as Industrial, Technical and Professional Employees Union (or ITPEU) is affiliated with Office & Professional Employees International Union, AFL-CIO (OPEIU), and known as Local 4873 under that affiliation.

² Under a "National Agreement" entered into by the Respondent with Industrial, Technical & Professional Employees Union, AFL-CIO (ITPEU) on June 5, 2005, and effective from June 1, 2005 through May 31, 2008, the Respondent agreed to recognize ITPEU as "sole bargaining agent for all its non-supervisory employees, excluding all managerial employees and supervisors, as defined in Section 2 of the...Act." (See, GCX-2).

Findings of Fact

I. Procedural history

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As stated, following issuance of the complaint on May 30, 2008,³ the Respondent, through Gurkin, submitted a letter on June 12, 2008, purportedly to serve as its answer to the complaint. (See GCX-1[g]). Gurkin's letter, in pertinent part, reads as follows:

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"It is my understanding that the investigation has been terminated for the Western PA area and a hearing set for the Eastern PA area on August 7, 2008.

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I feel this matter has been resolved when the Union representative, Mr. Charles Hampton, acknowledging to Tarheel that the [sic] is no union addendum for the Eastern PA that was accepted and signed by Mr. Daniel B. Gurkin, President of Tarheel. I have enclosed his correspondence.

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To date it has been acknowledged by the Union, USDOL and the Contracting Agency, as well as Tarheel that no union addendum was ever signed for the Eastern PA.

I request that any action against Tarheel be dismissed."

//s Daniel B. Gurkin, President

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On July 8, 2008, the General Counsel, apparently of the view that Gurkin's letter did not amount to a proper answer to the complaint, filed a motion for partial summary judgment with the Board, asserting that the Respondent had failed to file an answer to the complaint as required by Section 102.20 and 102.21 of the Board's Rules.⁴ By Order dated January 29, 2009, the Board denied the General Counsel's motion on grounds that it lacked a majority to grant default judgment. (See GCX-1[n]). The matter was then rescheduled for hearing for May 21, 2009.

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At the hearing, the General Counsel asked that the allegations in complaint paragraphs 1-4⁵ be deemed admitted to be true as the Respondent, in its June 12, 2008 purported answer,

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³ The complaint advised the Respondent that a hearing on the allegations would be held on August 7, 2008, and that, under Sections 102.20 and 102.21 of the Board's Rules and Regulations, it was required to file an answer to the complaint on or before June 13, 2008.

⁴ Section 102.20 states that a respondent "shall, within 14 days from the service of the complaint, file an answer thereto. The respondent shall specifically admit, deny, or explain each of the facts alleged in the complaint, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. All allegations in the complaint, if no answer is filed, or any allegation in the complaint not specifically denied or explained in an answer filed, unless the respondent shall state in the answer that he is without knowledge, shall be deemed to be admitted to be true and shall be so found by the Board."

⁵ Complaint paragraph 1 alleges that the charge and amended charge were properly served on the Respondent; paragraph 2 describes the Respondent's business operations, sets forth the Board's jurisdictional amounts, and alleges that the Respondent is an employer as defined by Continued

did not admit, deny, or address said allegations, as required by Section 102.20. A review of Respondent's June 12, 2008, letter supports the General Counsel's assertion, for, as described above, nothing in the letter can be read as denying any of the allegations set forth in complaint paragraphs 1-4. The Respondent, as noted, was not at the hearing and, consequently, no explanation or clarification was provided for the Respondent's failure to comply with the requirements of Section 102.20 in its June 12, 2008, response to the complaint. Accordingly, I grant the General Counsel's request and find the allegations in complaint paragraphs 1-4 have been admitted as true.

10 II. Jurisdiction

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The Respondent, a North Carolina corporation, has been engaged in providing security services to the federal government at facilities located throughout the United States, including facilities located in the Commonwealth of Pennsylvania.⁶ During the year preceding issuance of the complaint, a representative period, the Respondent, in the course and conduct of its business operation, performed services valued in excess of \$50,000 outside the Commonwealth of Pennsylvania. The Respondent, as discussed above, admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. Alleged Unfair Labor Practices

A. Factual background

E. Charles Hampton is employed by the Union and has served as its representative for eleven years. He testified, credibly and without contradiction, that during that period, the Union has served as the exclusive collective bargaining representative for security guards employed by various employers at GSA-managed federal facilities in eastern Pennsylvania. Hampton noted that during his eleven years as Union representative, some five different employers have employed the guards at these facilities, explaining that the employer turnover at these facilities results when a contract between an employer and the federal government expires, or when the government terminates the agreement because the employer failed to comply with its terms.

In June 2005, the Respondent took over the security guard operations at these facilities and, as referenced in fn. 2 supra, entered into a 3-year collective bargaining agreement (the National Agreement) with the Union, which was effective by its terms from June 1, 2005-May 31, 2008. Also, on July 27, 2005, the Respondent and the Union executed a local addendum called for by the National Agreement, which became effective on October 1, 2005, setting forth the wages and other economic fringe benefits employees would be receiving. The addendum was to remain in effect for one year. Thus, Article XXVIII, Section B of the National Agreement provided that the parties were to meet on or about January 1, of each contract year "for the purpose of negotiating changes in wages, group insurance contributions, sick leave, vacation

the Act; paragraph 3 alleges the Union to be a labor organization within the meaning of the Act; and paragraph 4 alleges Respondent's president Daniel Gurkin, its Central Regional Manager Will Cartwright, its Security Manager Rickie Day, and its Security Sergeant Iusi, to be supervisors and agents within the meaning of Section 2(11) and 2(13) of the Act.

⁶ The Respondent's offices are located in Linden, North Carolina. There is no evidence that it maintains any other facility of its own in Pennsylvania.

⁷ The October 1st effective date for the addendum was intended to coincide with the start of the federal government's fiscal year.

and holidays, as well as changes in, or the introduction of, other fringe benefit programs...." Section B also provided that "[i]f the parties were unable to reach agreement by March 1st of each year, either party may terminate this Agreement upon ten (10) days written notice to the other party." (GCX-2, p. 19).

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A similar addendum containing changes to employees' wages and benefits was negotiated and entered into by the parties in August 2006. As with the prior 2005 Addendum, the 2006 Addendum to the parties' collective bargaining agreement provided for, inter alia, an Annual Benefit Fund (ABF fund), from which certain employee benefits, including vacation, holidays, sick leave, jury duty, bereavement leave, were paid. The Respondent was required under the Addendum to contribute a specified amount "per hour worked by each and every employee covered by the agreement, for which the Respondent makes or is required to make direct payment of wages to employees." (See GCX-4, p. 8).

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The National Agreement also contained a union security clause requiring employees to become members of the Union on or after their 30th day of employment, and requiring the Respondent, on receipt of signed written authorizations from employees, to deduct Union dues from the employees' wages, and to remit the same to the Union. (See GCX-2, Article II).⁸

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Regarding contract renewal, Article XXVIII, Section A of the parties' agreement, which, as noted, remained in effect from June 1, 2005 through May 31, 2008, provided that the agreement "shall renew itself each successive June 1, thereafter unless written notice of an intended change is served in accordance with the Labor Management Relations Act is amended by either party hereto at least sixty (60) days, but not more than ninety (90) days, prior to the termination date of this contract." (GCX-2, p. 19).

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Hampton testified that sometime prior to June 2007, he spoke with Ricky Day about setting a date for the start of negotiations on the 2007-2008 addendum. He testified, without contradiction, that Day asked him to prepare the necessary documents reflecting the changes in wages and other economic fringe benefits (health and welfare, pension, uniform allowance) the Union was seeking, and to include therein a 3% wage increase. Hampton, in fact, prepared a proposed 2007-2008 Addendum (GCX-5) and forwarded it to Day on or around August 30, 2007. In the Addendum, Hampton also proposed an increase in the contribution amounts to be made by the Respondent to the ABF fund in the upcoming year. According to Hampton, Day did not respond or provide any feedback to him on his proposal until sometime in August, when Day contacted him to complain that the wages were too high and that he was not going to sign the proposed Addendum. Nothing in Hampton's credited and undisputed account of that discussion reflects that Day expressed opposition to the increase being proposed by the Union to the ABF fund contribution amounts. Hampton, at that point, turned the negotiations over to the Union's secretary-treasurer, John Brenton.

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Hampton also testified that sometime in 2007, he could not recall when, he received some memos from the shop steward, that had been posted for employees by the Respondent on its bulletin board, stating that effective October 1, the Respondent was pulling out of the ABF fund. He identified a document, received in evidence as GCX-6, as one such memo. GCX-6 is an October 5, 2007 memo from the Respondent to all employees advising that "effectively

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⁸ GCX-9 is a copy of the type of letter which the Union generally sent to the Respondent advising that it had received a dues deduction authorization card from an employee and requesting that the Respondent commence deducting, and remit to the Union, the appropriate dues from the employee's wages.

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immediately," employee requests for "paid time off, vacations, sick days, bereavement, jury duty, and holidays," would be paid by the Respondent and would not be submitted to the ABF fund. The memo states that requests for benefits received prior to October 1, would still be paid by the ABF fund. In a subsequent memo to employees on "raise[s] and Union issues" dated October 26, the Respondent reiterated that it had, as of October 1, 2007, stopped complying with the ABF fund. (see GCX-7).

On learning of these memos, Hampton wrote to Gurkin and advised him that he was aware of the memos and of Respondent's intent to pull out of the ABF fund, and that the Union viewed such conduct as an unfair labor practice and a violation of the parties' collective bargaining agreement (GCX-8). He demanded that the Respondent "immediately cease and desist from any action which would further deprive the unit employees of their coverage under the ABF," and that it "continue to make the contributions to the ABF required under the collective bargaining agreement." He testified, credibly and without contradiction, that before writing to Gurkin, he had phoned and spoken with Day advising him of the Union's position regarding the ABF fund, stating that the parties were under a contract and that the Respondent couldn't simply pull out. Day did not explain or respond to Hampton's assertion, other than to say that they would get back to Hampton.

Hampton also testified that sometime prior to August 2007, he became aware that the Respondent was not remitting to the Union the union dues it had withheld from employees' wages. Hampton then asked unit members to review their pay stubs and let him know if the dues had been deducted, and they reported to him that their dues were, indeed, being deducted from their wages. His several attempts to contact and discuss this matter with Gurkin were unsuccessful, as he was repeatedly told that Gurkin was not in the office, and that no one knew 25 of his whereabouts. Hampton did recall speaking with Mrs. Bev Gurkin on several occasions about the dues, and being told by Mrs. Gurkin that the Respondent would be sending the Union a check for the dues by FEDEX sometime that week. According to Hampton, the check covering the dues never arrived. Hampton credibly testified that, to his knowledge, at no time did the Respondent ever claim not to have received dues deduction authorizations from 30 employees.

On January 14, 2008, the Union, through its attorney, sent a letter to the U.S. Department of Labor, Wage & Hour Division, complaining about the Respondent's failure to remit the union dues it had collected from employees and requesting an investigation. (See GCX-13).9 According to Hampton, some funds were indeed recovered or seized from the Respondent by the Department of Labor and, as of the hearing date, were waiting to disbursed.

As noted, Brenton took over the negotiations from Hampton after Day complained that the wage rates in the Addendum submitted to him by Hampton were too high and that he, Day, was not going to sign it. Brenton testified that Day contacted him sometime in September 2007, and complained that the figures in the Addendum were too high, and that he wanted some adjustments made. After reviewing the numbers in the Addendum, and going back and forth with Day over the figures, Brenton penciled in the changes made in the Addendum and sent the revised Addendum to Gurkin for approval. (See written notations in GCX-5). Brenton contends that he subsequently received the revised Addendum with a great big "NO" written across it. It is unclear who, Gurkin or Day, may have written the "NO" on the Addendum and returned it to Brenton.

⁹ GCX-13 was inadvertently dated 2007, rather than 2008. (Tr. 32).

Brenton recalled speaking with Day sometime around October 11, 2007, in an effort to work out the disputed figures. He further recalled that, during this conversation, Day stated that he wanted to pull employees out of the ABF fund because it was too costly for him and he was not going to pay such amounts. Day, he contends, further mentioned that employees had complained about the ABF fund and wanted out. Brenton replied that he could not allow the Respondent to pull out, but agreed to meet with employees later that month to hear their complaints, and let them decide whether or not to pull out of the fund. He agreed to get back to Day after meeting with employees.

Brenton met with unit employees on October 27, 2007, and found them upset with him because they believed he or the Union had approved the Respondent's withdrawal from the ABF fund. The Respondent, as noted, had apparently withdrawn from the fund by then. The employees told Brenton they wished to remain in the fund. On October 30, 2007, Brenton wrote to Gurkin explaining that employees opposed Respondent's withdrawal from the fund, and insisted that the Respondent "cease paying the benefits directly to employees and resume contributions to the Annual Benefit Fund." Brenton demanded in the letter that the Respondent "adhere to the current collective bargaining agreement and make contributions to the Annual Benefit Fund current so that your employees can receive the benefits that they are entitled." (GCX-15).

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By letter dated November 5, 2007, Day concurred with Brenton that the parties did have an agreement in place, then proceeded to inform him that, pursuant to Art. XXVIII, Section B of the parties' collective bargaining agreement entitled "DURATION", it was providing the Union with a 10-day notice of its intention to terminate the agreement. (See GCX-16). On November 13, Brenton wrote to Gurkin in response to Day's November 5, letter stating, inter alia, that the termination notification set forth in Day's latter was "untimely for 2007 and premature for 2008." Brenton explained at the hearing that the termination notice was untimely as it was outside the 60-90 day window period described in Article XXVIII, Section A during which any such termination notice must be made to be effective. Brenton testified, credibly and without contradiction, that, after its November 5, 2007, contract termination letter, the Respondent stopped honoring the collective bargaining in that it stopped paying into the ABF fund, and the the Health and Welfare and Pension funds, and had never remitted to the Union the union dues it had withheld from employees' wages. (Tr. 40).

The Respondent, however, remained the employer of the unit employees until October 1, 2008, when it was replaced as the employing contractor of the unit employees by Knight's Protective Services. (Tr. 32).

Discussion

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On brief, the General Counsel and the Charging Party contend, and I agree, that the Respondent's failure to remit to the Union the dues it had deducted from employees' wages, and to make contributions to the ABF fund, as required by the parties' agreement, without first bargaining, or reaching a valid impasse, with the Union over said decisions, as well as its unilateral decision to terminate the parties' agreement, constituted violations of Section 8(a)(5) and (1) of the Act, as alleged in the complaint.

As to Respondent's failure to remit dues, the Board has held that "it is a violation of Section 8(a)(5) and (1) of the Act for an employer to fail to abide by the provisions of its collective-bargaining agreement with its employees' representative including provisions calling for it to deduct union dues from its employees paychecks pursuant to valid dues-checkoff authorizations and remit same to the Union." *Holt Plastering, Inc,* 317 NLRB 451, 457 (1995);

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Branch International Services, Inc., 313 NLRB 1293, 1300 (1994); International Distribution Centers, 281 NLRB 742, 743 (1986).

The parties' agreement, as noted, required the Respondent to collect and remit to the Union dues deducted from employee wages. Evidence, in the form of dues deduction authorization cards signed by Respondent's unit employees, and uncontradicted and credible testimony by Brenton, make clear that employees had authorized the Respondent to deduct Union dues from their paychecks. Brenton, as further noted, testified, credibly and without contradiction, to being told by employees that the Respondent indeed had been deducting dues from their paychecks. No explanation was proffered at the hearing as to why the Respondent failed to remit the dues which, I find, were, in fact, deducted but not forwarded to the Union, as required under the parties' national agreement. Notably, the guestion of the deduction of dues was not the subject of discussion, or even raised, during negotiations for the 2007-2008 Addendum, thus negating any possible claim that this particular matter, e.g., the deduction of, and failure to remit, dues by the Respondent was negotiated and/or that impasse on this matter may have been reached. Indeed, the dues deduction provision, as noted, is not found anywhere in the addendum and is, as noted, contained only in the parties' national agreement, making it highly unlikely that it would have been mentioned or discussed by the parties during the very limited discussions that took place regarding 2007-2008 addendum. Accordingly, the Respondent's failure to comply with its contractual obligation to remit collected Union dues to the Union since October 1, 2007, was unlawful and, as stated, a violation of Section 8(a)(5) and (1) of the Act.

Its unilateral decision to stop contributing to the ABF fund beginning October 1, 2007. was, as stated, also unlawful. The record, as noted, makes clear that under its collective bargaining agreement with the Union, the Respondent was required to make contributions to the ABF fund to cover certain fringe benefit costs relating to, inter alia, vacation, holidays, sick leave, jury duty, and bereavement leave. These benefits formed an integral part of the employees' terms and conditions of employment, rendering the Respondent's contractual obligation to make the contributions a mandatory subject of bargaining. 10 It is well-established that an employer may not make unilateral changes in matters which are mandatory subjects of bargaining. NLRB v. Katz, 369 U.S. 736 (1962); See, also, Wilshire Plaza Hotel, 353 NLRB No. 29 (2008); Indulac, Inc., 344 NLRB 1075, 1080 (2005); Duane Reade, Inc., 342 NLRB 1016, 1031 (2004); Buck Brown Contracting Co., 272 NLRB 951, 953 (1984). As explained by the Board in Buck Brown, supra, an employer violates Section 8(a)(5) "when (1) it unilaterally changes or discontinues existing terms and conditions of employment—including contributions to contractual fringe benefit funds—upon the expiration of a collective-bargaining agreement unless: (1) the union has waived bargaining on the issue; or (2) the parties have bargained to impasse and the unilateral change is reasonably encompassed by the employer's preimpasse proposals It also is well settled that an employer acts in derogation of its bargaining obligation under Section 8(d) if it unilaterally changes or otherwise repudiates terms or conditions of employment contained in a collective-bargaining agreement during the life of that agreement."

Here, the record makes clear that at no time prior to making and implementing its decision to cease contributing to, and to withdraw from, the ABF fund effective October 1, 2007,

¹⁰ Mandatory subjects of bargaining are those comprised in the phrase "wages, hours, and other terms and conditions of employment" as set forth in Section 8(d) of the Act. *NLRB v. Borg-Warner*, 356 U.S. 342, 349 (1958); See, also, *Axelson, Inc.*, 234 NLRB 414, 415 (1978); *RCA Corp.*, 296 NLRB 1175, 1176 (1989); *Ohio Power Company*, 317 NLRB 135, 141-142 (1995).

did the Respondent bother to notify the Union of its decision, or offer to negotiate any changes to the fund. Nor is there anything in the record to suggest that the Respondent ever conveyed to the Union any misgivings or dissatisfaction it may have had with its contractual obligation to the ABF fund. Indeed, when Hampton, in late August, presented Day with the proposed 2007-2008 Addendum containing new wage rates for employees, along with a proposed increase in the Respondent's contributions to the ABF fund, Day's only complaint and stated reason, according to Hampton's credited testimony, for not wanting to sign the Addendum was that the wage rates were too high. Nothing in Hampton's undisputed account of this conversation with Day suggests that the latter expressed any opposition to, or disagreement with, the Union's proposed increase in the Respondent's contribution amounts to the ABF fund.

In sum, the Respondent's decision to stop contributing to, and to withdraw from, the ABF fund as of October 1, 2007, was made without any prior notice to or consultation with the Union. Although the Union did eventually learn of the Respondent's decision, it did so after the fact, sometime after October 5, 2007, after its implementation, and not from the Respondent, but rather from memos to employees posted by the Respondent on its bulletin board informing employees of its withdrawal from the fund. In effect, the Respondent's unilateral decision had become a fait accompli by the time the Union learned of it. Industrial Hard Chrome, Ltd., 352 NLRB 298, 313 (2008); Hospital Español Auxilio Mutuo De Puerto Rico, Inc., 342 NLRB 458, 467, fn. 7 (2004), enfd. 414 F.3d 158 (1st Cir. 2005). No argument has been made or presented here, nor is there any record evidence to suggest, that the Union had waived its right to bargain over the subject of the ABF fund. That the Union included, as part of its proposed 2007-2008 Addendum, a proposed increase in the Respondent's contribution amount to the ABF fund, makes clear that the Union viewed the matter as up for negotiation and not waived. A union, in any event, cannot be held to have waived bargaining over a change that is presented to it as a fait accompli. Gulf States Mfg., Inc. v. NLRB, 704 F.2d 1390 (5th Cir. 1983); The Bohemian Club, 351 NLRB 1065, 1066-1067 (2007). Accordingly, I find that the Respondent's unilateral decision to cease contributing to, and to withdraw from, the ABF fund as of October 1, 2007, was unlawful and a violation of Section 8(a)(5) and (1) of the Act, as alleged.

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Finally, the Respondent's decision to terminate its collective bargaining agreement with the Union was, as alleged in the complaint, also unlawful. The Respondent, as noted, gave the Union a 10-day notice, under Article XXVIII, Sec. B, of its intent to terminate their collective bargaining agreement. As described above, this provision allows for a 10-day termination notice if the parties are unable to reach an agreement by March 1, of each year.

However, Section 8(d) of the Act, in pertinent part, provides that where there is in effect a collective bargaining agreement covering employees in an industry affecting commerce, as is clearly the case here, the duty to bargain collectively, means, inter alia, that no party to such contract shall terminate or modify such contract unless the party desiring such termination or modification offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications. The "meet and confer" requirement of Section 8(d) does not compel either party to accept the other's contract proposals or to make concessions, but it does require the parties to bargain in good faith with a view towards reaching agreement on employee wages, hours, and other terms and conditions of employment.. Regency Service Carts, Inc., 345 NLRB 671 (2005); U.S. Ecology Corp., 331 NLRB 233 (2000).

Here, the Respondent's decision to terminate its collective bargaining agreement with the Union was not preceded by any good faith bargaining on its part. Indeed, as correctly argued by the General Counsel on brief, and as record evidence clearly shows, the Respondent never engaged in any bargaining whatsoever before deciding to abrogate the contract. The

only attempt at negotiations that occurred here between the parties occurred when the Union sought to have discussions on a new 2007-2008 addendum. This effort was initiated by the Union, through Hampton, who, at Day's request, prepared a proposed new addendum in late August 2007, containing, among other things, a wage increase for employees that Day himself had recommended. However, on receipt of the Union's proposal, Day inexplicably complained that the employee wages were too high. Instead of offering a counterproposal or agreeing to sit down to negotiate the changes desired by the Respondent, Day simply informed the Union it would not sign the proposed addendum. The Union subsequently received a similar response from the Respondent's president, Gurkin who, like Day, complained to Union secretarytreasurer Brenton about the wage rates in the proposed addendum and declared he would not sign it. Brenton admits that he and Day did have a discussion on the rates contained in the Union's proposed addendum and that he penciled in some changes purportedly in response to those discussions. Other than this testimony by Brenton, the record does not make clear how long this discussion lasted, what else may have been said, whether the Respondent actually offered any counterproposals, or why Brenton made the changes he did to the wage figures contained in its proposal. It does seem clear, however, that this was the extent of the bargaining engaged in by the Respondent. Gurkin likewise made no attempt to engage in negotiations over the wage rates or over any other matter, including, as noted above, the increase in the employer contribution to ABF fund, contained in the Union's proposed addendum.

In sum, the Respondent's conduct preceding its November 30, 2007, contract termination notice to the Union involved little or no bargaining whatsoever and, if anything, reflected bad faith and a total disregard for its collective bargaining obligations under Section 8(d). Thus, the only subject matter on which the Respondent could feebly argue that negotiations occurred, to wit, the proposed wage increase set forth in the Union's proposed addendum, the Respondent, as noted, simply rejected outright the Union's proposal without engaging in any serious or actual negotiation on the subject matter or offering counterproposals of its own. Its conduct in this regard clearly reflects a bad faith approach to bargaining. Respondent, as found above, further demonstrated its bad faith by unlawfully failing and refusing to remit collected Union dues to the Union, and by unilaterally discontinuing its contributions to, and withdrawing from, the ABF fund. In these circumstances, the Respondent's decision to unilaterally terminate its collective bargaining agreement was, as stated, unlawful and a violation of Section 8(a)(5) and (1) of the Act.

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While the Charging Party agrees that the Respondent's bad faith and unlawful conduct precluded the Respondent from unilaterally withdrawing or terminating its National Agreement with the Union, it nevertheless contends that the Respondent's November 5, 2007, 10-day notice of termination was, in any event, ineffectual as it was not given within the 60-90 day window period described in Article XXVIII, Section A. It further argues that since the Respondent failed to give a proper notice of termination, under the renewal language of Article XXVIII, Section A, the National Agreement was automatically renewed and remained in full force and effect until October 1, 2008, when the Respondent was replaced by Knights Protective Service as the employer of the unit employees.

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There are, however, sufficient ambiguities in the wording of Article XXVIII, Sections A and B so as to make it difficult to determine whether, absent its bad faith bargaining and unlawful conduct which, as noted, precluded it from terminating the Agreement, the Respondent's November 5, 2007, 10-day termination notice would normally have been sufficient

to terminate that Agreement.¹¹ It is, nevertheless, clear that the Respondent's 10-day termination notice was rendered ineffectual and a nullity as a result of its overall failure to engage in good faith bargaining with the Union over the terms for a new Addendum, and as a result of the unfair labor practices committed in not complying with its contractual obligation to remit to the Union the dues withheld from employee wages, and unilaterally withdrawing from the ABF fund. The National Agreement, therefore, remained in full force and effect notwithstanding the Respondent's unlawful attempt to terminate it on November 5, 2007, and remained so through its May 31, 2008 expiration date, at which point it automatically renewed itself pursuant to the renewal provision in Article XXVIII, Section A, as neither party gave notice of an intent to terminate it within the 60-90 day period preceding its May 31, expiration. Consequently, the Respondent's obligation to contribute to the various funds, including the ABF fund, the Health and Welfare Fund, and the Pension Fund continued through September 30, 2008, after which it ceased being the unit employees' employer.¹²

15 Conclusions of Law

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1. The Respondent, Tarheel Specialties, Inc., Linden, North Carolina, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Industrial, Technical and Professional Employees Union, OPEIU Local 4873, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act, and was, from on or about June 5, 2005 to September 30, 2008, the exclusive bargaining representative of all nonsupervisory employees employed by the Respondent at GSA-managed federal facilities in

25 11 Thus, under Article XXVIII, Section A, a party wishing to make a change to the Agreement, including presumably its termination, was required to give written notice within the 60-90 day window period preceding its May 31, 2008, expiration date. Article XXVIII, Section B, on the other hand, states that if the parties are unable to agree on a new addendum by March 1, of the contract year, either party may terminate the National Agreement after giving the other 30 party 10-day notice. A plain reading of this latter provision would seem to suggest that the contract was terminable during each of the contract years by either party, notwithstanding the 60-90 day window period set forth in Section A, if the parties were unable to conclude a new addendum by March 1, of that year. There appears to be no restriction in the language of Section B as to when the 10-day notice was to be given, which might explain why the 35 Respondent chose to give its 10-day notice on November 5, 2007. This particular construction, however, seems at odds with the 60-90 day notice requirements of Section A, and would appear to render it meaningless and superfluous. The Respondent, as noted, chose not to appear at the hearing to provide its own explanation for believing that its 10-day termination notice was

contractually proper, and no attempt was made at the hearing to explain these apparent

ambiguities and inconsistencies in the wording of Sections A and B of Article XXVIII.

12 While the complaint alleges that the Respondent unlawfully failed to make contributions to, and withdrew from, the ABF fund, it is clear from Brenton's undisputed testimony that the Respondent also ceased making contributions to the Union's Health and Welfare and Pension funds following its unlawful termination of the Agreement. The Charging Party contends, and I agree, that while the Respondent's failure to continue making contributions to the Health, Welfare, and Pension funds is, unlike the cessation of payments to the ABF fund, not specifically alleged as unlawful in the complaint, said conduct was a byproduct of the Respondent's unlawful termination conduct which is alleged as a separate violation. Accordingly, and as Brenton's testimony makes clear this particular issue was fully litigated at the hearing, I find it to be properly before me for consideration and for providing the relief necessary to remedy the unlawful contract termination conduct.

eastern Pennsylvania.

3. By failing and refusing since October 1, 2007 to remit to the Union the union dues it withheld from employee wages, and failing and refusing to make required contractual contributions to, and withdrawing from, the Union's ABF fund, the Respondent violated Section 8(a)(5) and (1) of the Act.

- 4. By unilaterally terminating its collective bargaining agreement with the Union without bargaining in good faith or reaching impasse in negotiations as required by Section 8(d), the Respondent violated Section 8(a)(5) and (1) of the Act.
- 5. The above-described unfair labor practices engaged in by the Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

15 Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

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The Respondent shall be required to remit to the Union the union dues it withheld from employee wages from October 1, 2007 through September 30, 2008, when it ceased being the employer of the unit employees, with interest on said amounts to be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987) Regarding its unlawful failure to make payments and/or contributions to the Annual Benefit Fund, the Health and Welfare Fund, and the Pension Fund, the Respondent shall be required to remit such payments and/or contributions to said funds, with any interest and/or applicable penalties owed as prescribed in *Merryweather Optical Co.*, 240 NLRB 1213, 1216 (1979).¹³ Further, the Respondent shall also be required to reimburse unit employees for any expenses they may have incurred as a result of Respondent's failure to make such required contractual payments, in accordance with *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir.1981), with interest on any such amounts. *New Horizons*, supra.

Finally, the Charging Party requests, and I agree, that the customary posting of a Notice to Employees at the Respondent's facility advising them of their Section 7 rights and of the Respondent's obligation to remedy its unlawful conduct would not be an adequate or sufficient remedy in this case. The Respondent, as noted, ceased being the unit employees' employer as of October 1, 2008, and the unit employees' work site is scattered around at different federal facilities throughout eastern Pennsylvania. The Respondent's own offices are located in North Carolina, and it does not appear that it maintains any offices or facilities in Pennsylvania. In these circumstances, I agree with the Charging Party that the Respondent should be required to mail copies of the Notice to Employees to all employees who were in the Respondent's employ through September 30, 2008, when it ceased being their employer. See, *The NLS Group*, 352

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¹³ Contributions to the ABF Fund shall include all payments that should have been, but were not, made beginning October 1, 2007, when the Respondent withdrew from the ABF Fund, until September 30, 2008, when Respondent was replaced as the employer of the unit employees. Payments and/or contributions to the Health and Welfare Fund and the Pension Fund shall include all payments that should have been made but were not beginning on November 5, 2007, when the Respondent gave the Union its 10-day contract termination notice until September 30, 2008.

NLRB 744, 746 (2008).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁴

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ORDER

The Respondent, Tarheel Specialties, Inc., Linden, North Carolina, its officers, agents, and representatives, shall

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- 1. Cease and desist from
- (a) Failing and refusing to remit contributions and/or payments it was required to make to the Annual Benefit Fund, the Health and Welfare Fund, and the Pension Fund, as required by the collective bargaining agreement it had with Industrial, Technical and Professional Employees Union, OPEIU Local 4873, AFL-CIO, and failing and refusing to remit to the Union the union dues it withheld from employee wages, as was required by that agreement.
- (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
 - 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) Make unit employees whole by remitting to the Annual Benefit Fund, the Health and Welfare Fund, and the Pension Fund the payments and/or contributions it was required to make under its collective bargaining agreement, and reimburse unit employees for any and all expenses incurred resulting from the Respondent's failure to make such payments or contributions, as set forth in the "Remedy" portion of this decision.
 - (b) Remit to the Union all union dues that were withheld from unit employees' wages from October 1, 2007 through September 30, 2008, with interest.
 - (c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the Respondent's compliance with the terms of this Order.
- 40 (d) Within 14 days after service by the Region, mail copies of the attached notice marked Appendix, 15 at its own expense, to all nonsupervisory employees who were employed by the

Continued

¹⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Respondent at various federal facilities in eastern Pennsylvania from October 1, 2007 through Septembers 30, 2008. The notice shall be mailed to the last known address of each of the employees after being signed by the Respondent's authorized representative.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn 5 certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply. Dated, Washington, D.C. September 11, 2009 10 George Alemán Administrative Law Judge 15 20 25 30 35 40 45

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union Choose representatives to bargain with us on your behalf Act together with other employees for your benefit and protection Choose not to engage in any of these protected activities

WE WILL NOT fail and refuse to remit to the Union the union dues we withheld from our employees' wages from October 1, 2007 through September 30, 2008, and **WE WILL NOT** fail and refuse to remit contributions to the Annual Benefit Fund, the Health and Welfare Fund, and the Pension Fund that we were required to, but did not, make under the collective bargaining agreement we had with Industrial, Technical and Professional Employees Union, OPEIU Local 4873, AFL-CIO.

WE WILL remit to the Union, with interest, all union dues that we withheld from our employees' wages from October 1, 2007 to September 30, 2008, and **WE WILL** remit all contributions and/or payments that we were required to make under our collective bargaining agreement with the Union to the Annual Benefit Fund, the Health and Welfare Fund, and the Pension Fund, with interest.

WE WILL make unit employees whole by reimbursing them, with interest, for any expenses they may have incurred as a result of our failure to make the required contributions to the Annual Benefit Fund.

		TARHEEL SPECIALTIES, INC.	
		(Employer)	
Dated	Ву		
		(Representative)	(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

615 Chestnut Street, One Independence Mall, 7th Floor Philadelphia, Pennsylvania 19106-4404

Hours: 8:30 a.m. to 5 p.m.
215-597-7601.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 215-597-7643.